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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL AGUBA,

Defendant and Appellant.

G039130

(Super. Ct. No. 05NF2425)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed as modified.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gary Brozio and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Daniel Aguba was found guilty of first degree murder with an enhancement for personally using a deadly weapon. The trial court sentenced him to 25 years to life for the murder conviction with a consecutive one-year term for the gun enhancement. The court awarded 784 days of presentence credit, and imposed a \$10,000 restitution fine and a \$10,000 parole revocation fine, which will be imposed only if Aguba fails to complete parole successfully.

On appeal, Aguba contends the trial court made evidentiary errors that were prejudicial to him. He also contends the trial court miscalculated his presentence custody credit. We agree with his assertion that the trial court erroneously calculated his presentence custody credits and modify the judgment accordingly. In all other respects, the judgment is affirmed.

FACTS

On June 23, 2005, around 8:00 or 9:00 o'clock in the evening, Fatima Bumatay was stabbed to death in the front seat of her car while it was parked in the Brea Mall parking lot. Juan Magana and his two children witnessed the incident. The Maganas were returning to their truck after shopping in the mall when they saw Bumatay and a man standing next to a nearby vehicle. They appeared to be talking to each other.

A couple of minutes later, Bumatay ran away from the man to another nearby parked car. The man first got into the car where they had been standing, stayed inside for a few seconds, and then jumped out of that car and ran after Bumatay. By the time he reached Bumatay's car, she was already inside and apparently looking for her keys. The man got into the passenger side of Bumatay's car. At this point, Magana heard his younger son, Daniel, say, "Daddy something fighting in the car."

Magana got inside his own truck and watched what happened next. He testified, "I see like the man, like punching, you know, like – I see the hands and all the movement of the car." The fighting went on for about 30 seconds and Magana heard Bumatay scream for help. Then the man opened the passenger side door of Bumatay's

car and ran back to the first car. Once inside, he drove away from the parking lot. At this point, Magana got out of his car. He saw Bumatay open her car door and fall to the ground. She was covered in blood. Magana called 911 for help.

David Wearp, a patrol officer with the Brea Police Department, responded to Magana's 911 call. He found Bumatay lying on her left side, facing her car. When he rolled her over, a knife fell away from her body. Although she had no pulse, Wearp performed CPR until the paramedics arrived. While they tended to Bumatay, Wearp tried to "find out any body and everybody that had seen any witnesses – or had seen the suspect." During his investigation, a man brought him a baby sitting in a car seat. The person told him, "I took this from the back of [Bumatay's car]."

Aguba was arrested around three o'clock the next morning by Orange County Sheriff's Deputy Gregory Stegner, who found him asleep in his car. The car was parked in an alley about one-half to three-quarters of a mile from Aguba's parents' house and a mile to a mile and one-half from Bumatay's mother's house, which was Bumatay's residence at the time of her death.

Magana later identified Aguba's car from a picture and said that it was the car that the man drove away from the incident. He described the man as Asian, five feet six inches tall, about 200 pounds, and between 25 and 30 years of age. However, Magana was not able to identify Aguba from the photo lineup because he said he did not see the man's face. Magana identified Aguba in court, but only as someone who looked "exactly" like the man involved because he had the same physique and weight.

Magana's son Joseph, who was 11 years old at the time of the incident, testified that he heard "a lady screaming for help" and saw a man run away from the car. The day after the incident, Joseph's father showed him a picture of Aguba in the newspaper. Subsequently, Joseph was asked to identify the man from a photo lineup. He chose Aguba's photo, but he was not positive it was the man he saw. Joseph also

identified Aguba at the preliminary hearing and at trial. At trial, Joseph said he was “pretty sure” Aguba was the man, but “not positive.”

The baby in the back seat was identified as Bumatay’s son, Jesse, who was just short of his first birthday. He and his older brother, Joseph, who was four years old, were fathered by Aguba. Bumatay had ended her relationship with Aguba sometime within the year preceding her death. Eight months before her death, Bumatay started dating Morno Iep. Iep testified he had never spoken to Aguba in person, but he was often present when Aguba came over to Bumatay’s house. Although Iep “never . . . eavesdropped or knew what the conversations [were] about,” he could “hear them raising their voices, screaming at one another, but I pretty much tuned myself out from their arguments.”

The Brea Police Department reviewed Aguba’s phone records. The prosecution introduced a list of calls from Aguba’s cell phone to Bumatay’s cell phone. According to this list, from April 8 to June 12, 2005, there were 2,685 dialed calls and 118 text messages from Aguba’s cell phone to Bumatay’s. On May 7 alone, there were 277 calls. Most of the calls lasted less than one minute. Moreover, Aguba called Iep “a lot.” The calls were described as “angry” and full of obscenities. As Iep stated, “In the beginning, . . . he [would] ask me questions, you know like as if he’s trying to figure out whether if my relationship with [Bumatay] was serious or not. [¶] . . . [¶] Towards the end, after like I noticed that his relationship with [Bumatay] was pretty much just fights and arguments, and when he kept calling me, after a while I just ignored him. I didn’t pick up any calls.” During a call that occurred within two weeks of the murder, Iep told Aguba that Bumatay was pregnant with Iep’s child. Iep said, “I was hoping that with that news he would just leave us alone knowing that it’s serious.”

Julianne Buckenberger, a forensic scientist for the County of Orange, conducted DNA testing and prepared a report from the results. She explained that Aguba’s DNA standard was created by identifying 13 specific locations on the DNA

molecule from his sample and specifying which markers he had at each location. She then analyzed DNA material taken from underneath Bumatay's fingernails. This sample contained DNA from more than one person, or a DNA mixture. Buckenberger was able to identify markers from the DNA mixture sample at the same 13 locations she located in Aguba's DNA standard. She then compared Aguba's sample with the DNA mixture sample and found that Aguba's markers were present at every location in the mixture.

Buckenberger then created a population frequency estimate. Buckenberger explained, "A population frequency estimate is just a measure of how common or how rare a particular profile is. So for each of these different markers at each different location there's been data collected and there have been frequency estimates. [¶] . . . [¶] So as you go across all 13 locations [of the DNA mixture], the chances of finding somebody with, other than the person who deposited this DNA, the chances of finding somebody else with the identical profile is extremely rare." She concluded that only "1 in 10,000 unrelated individuals" could be possible contributors to the DNA mixture from the fingernail swabbings.

Buckenberger also tested DNA located on the knife handle. Aguba's markers were not present at every location in the DNA mixture taken from the knife handle. But Buckenberger could not eliminate him as a contributor to the DNA mixture on the knife handle because there was a large amount of Bumatay's DNA on the handle and only a small amount from the minor contributor. Buckenberger concluded that only one in 2,000 persons could fit the minor contributor profile, which was consistent with Aguba's DNA standard.

Suzanne Gibson worked with Bumatay at a state hospital for disabled adults for about four or five months before the murder. Gibson was a teaching assistant, and she trained Bumatay, a student assistant. One day in May 2005, the month before Bumatay was killed, Bumatay came into work "and was very quiet and didn't look quite right" "Her eyes were red and puffy," and "[s]he had her head held down." Gibson

took Bumatay aside into a storage closet and asked her what was wrong. Bumatay lifted up her face, and Gibson saw a bruise on the lower left jaw and cheek, about two inches wide. Bumatay began “crying hysterically” and “shaking real violently and tears were just streaming down her face So I grabbed her and held her to help her control the shaking.” Gibson asked what had happened and when Bumatay did not respond, Gibson said, “Was it him?” Bumatay nodded yes and asked whether Gibson thought she should get a restraining order. “She was asking if she thought it would benefit her. She was in fear for her life. [¶] . . . [¶] I said if she thought this was that serious, I would definitely do that.” Gibson interpreted “him” as referring to Aguba.

Gibson estimated the bruise on Bumatay’s face to be “about a day or two” old. She based that estimate on specific training she had received at the state hospital and her seven years of experience working there. She explained that developmentally and physically disabled adults sometimes “fall and hurt themselves or they may bang themselves . . . so we have to document that.”

DISCUSSION

Aguba contends the trial court erred in allowing Gibson to testify to Bumatay’s hearsay statements that she had been assaulted by a man she knew, whom Gibson concluded was Aguba, one month before her murder. After a hearing under Evidence Code section 402, the trial court overruled Aguba’s hearsay objection on the grounds that it was a spontaneous statement and a statement about Bumatay’s state of mind. We find if any error existed, it was harmless.

Hearsay is evidence of an out-of-court statement offered to prove the truth of the matter stated. (*People v. Alvarez* (1996) 14 Cal.4th 155, 185; Evid. Code, § 1200, subd. (a).) Hearsay evidence is generally inadmissible. “The chief reasons for this general rule of inadmissibility are that the statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot

observe the declarant's demeanor while making the statements.' [Citation.]" (*People v. Duarte* (2000) 24 Cal.4th 603, 610.)

The spontaneous statement exception to the hearsay rule provides that "[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) Case law has identified three requirements for admissibility: "(1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) The rationale for allowing a hearsay statement to be admitted into evidence is that the declarant's nervous excitement overrides her ability to reflect and fabricate, thus rendering the statement trustworthy enough to be presented to the jury. (*Ibid.*)

Aguba points out that Bumatay's hearsay statement was offered to prove that he hit her in the face hard enough to cause a bruise a month before her murder. He argues because the incident occurred up to 48 hours before her statement, Bumatay had ample time to reflect and fabricate, so the statement could not be considered spontaneous. The time element is important, but not determinative. "The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is thus not the nature of the statement but the mental state of the speaker. The nature of the utterance – how long it was made after the startling incident and whether the speaker blurted it out, for example – may be important, but solely as an indicator of the mental state of the declarant." (*People v. Farmer* (1989) 47

Cal.3d 888, 903-904.) Each case must be considered in light of its unique fact pattern, and the trial court has broad discretion to determine whether the exception applies. (*People v. Riva* (2003) 112 Cal.App.4th 981; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1290.)

The trial court here found that Bumatay's "emotional response to the query by Ms. Gibson [gave] the statements the aura of spontaneous, contemporaneous with an act or event and that would make them admissible." There is support for the court's determination in *People v. Brown* (2003) 31 Cal.4th 518. There, the declarant implicated the defendant about two and one-half hours after the murder of the victim by telling the testifying witness "'I know he shot her. I know she is hurt bad.'" (*Id.* at p. 540.) The declarant "was upset and started crying. He shook his head back and forth, and his body was shaking." (*Ibid.*) The trial court found the statement admissible under the spontaneous statement exception notwithstanding the passage of time. The Supreme Court agreed. "[T]he facts available to the trial court amply justify its conclusion that the declarant continued to labor mightily under the emotional influence of the disturbing events he perceived, so much so that he could not stop his body from shaking nor stem the flow of tears." (*Id.* at p. 541.)

Even though the bruising incident could have taken place as much as 48 hours before Bumatay's statement, she was so emotionally affected by the incident that her work supervisor pulled her aside to question her. According to Gibson, her eyes were red and puffy from recent crying, and as she told her story, Bumatay was "crying hysterically." Further, she was shaking so violently Gibson took physical control of her body. Under these circumstances, the trial court reasonably concluded that Bumatay's current emotional state made fabrication unlikely and the statement was thus sufficiently trustworthy to be presented to the jury.

But even if the evidence was erroneously admitted, we find it did not have a significant effect on the judgment. "'When the court abuses its discretion in admitting

hearsay statements, we will affirm the judgment unless it is reasonably probable a different result would have occurred had the statements been excluded.’ [Citation.]” (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1526.) The evidence against Aguba was strong: DNA evidence strongly implicated Aguba in the crime. Witnesses placed him at the scene, and he was seen talking to Bumatay at one car and then chasing her to another. These witnesses saw a violent confrontation and heard Bumatay call for help. Moreover, there is evidence of Aguba’s ongoing angry relationship with Bumatay that included obsessive telephone contact with her and her new boyfriend. Consequently, had Bumatay’s statement to Gibson been excluded, there is no reasonable probability that Aguba would have obtained a more favorable result.

Aguba also argues the trial court erred in allowing Wearp to testify about the baby being found in the back seat of Bumatay’s car. Aguba argues the evidence that the baby was present during the murder was likely to inflame the jury and should have been excluded under Evidence Code section 352 as more prejudicial than probative.

The prosecution argued the presence of Jesse in the car was relevant to motive, identity and intent, positing the theory that a stranger would be less likely to brutally murder a woman with a baby in her car than someone like Aguba, who had a contentious relationship with her. Whatever the merits of the prosecution’s theory, the image of a baby in the back seat during the murder, while disturbing indeed, is insignificant when compared to the images of the murder itself. Thus any error, even assuming such error exists, would be harmless. (*People v. Ramirez, supra*. 143 Cal.App.4th at p. 1526.)

Aguba’s final contention is that he should have received one additional day of presentence custody credit because the trial court made a calculation error. The prosecution concedes the error, and we agree.

Aguba is entitled to presentence custody credit for each day he spends in custody, including both the day of his arrest and the day of his sentencing. (Pen. Code,

§ 2900.5; *People v. Browning* (1991) 233 Cal.App.3d 1410, 1412.) Aguba was arrested on June 24, 2005 and remained in custody until he was sentenced on August 17, 2007. He should have received 785 days of presentence custody credit rather than 784.

DISPOSITION

The judgment is modified to give Aguba 785 days of presentence custody credit. In all other respects, the judgment is affirmed.

SILLS, P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.